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No. 99-1235

IN THE
Supreme Court of the United States

GREEN TREE FINANCIAL CORP.—ALABAMA, AND GREEN TREE FINANCIAL CORPORATION,
Petitioners,

v.

LARKETTA RANDOLPH,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

C. KNOX MCLANEY, III
MCLANEY & ASSOCIATES, P.C.
509 S. Court Street
P.O. Box 4276
Montgomery, Alabama 36103
(334) 265-1282

LYNN W. JINKS, III
JINKS, DANIEL & CROW, L.L.C.
219 N. Prairie Street
P.O. Box 350
Union Springs, Alabama 36089
(334) 738-4225

Counsel for Respondent

JOSEPH M. SELLERS *
SUZETTE M. MALVEAUX
DEBORAH J. VAGINS
COHEN, MILSTEIN, HAUSFELD & TOLL, P.L.L.C.
1100 New York Avenue, N.W.
West Tower, Suite 500
Washington, D.C. 20005
(202) 408-4600

* Counsel of Record

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COUNTERSTATEMENT OF THE QUESTIONS FOR REVIEW

1. Whether the court of appeals properly held that a district court's order compelling arbitration and dismissing with prejudice the entirety of the underlying individual and class claims constitutes a "final decision" that is subject to immediate review under the Federal Arbitration Act, 9 U.S.C. § 16(a)(3).

2. Whether the court of appeals properly held unenforceable an arbitration clause which failed to provide the plaintiff protection from the risk of bearing the costs of vindicating her statutory rights and the same opportunity to employ the class action mechanism, that would have been available under the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, in a judicial forum.

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RESPONDENT'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

On January 25, 1994, Plaintiff Larketta Randolph purchased a mobile home from Better Cents Home Builders, Inc. Pet. App. 2a.[1] Ms. Randolph financed her purchase through Green Tree Financial Corp.—Alabama, whose financing documents required her to acquire "vendors single interest" insurance, which protects a vendor or lienholder against the costs of repossession in the case of a default on her loan. *Id.* The installment contract also contains an arbitration provision which requires that disputes "arising from or relating to" the contract be resolved through arbitration. Pet. App. 2a-3a. The arbitration agreement does not permit the pursuit of claims on behalf of a group or class of claimants. Pet. App. 48a.

[1] Petitioners' petition for a writ of certiorari in this Court is referenced herein as "Pet. ——. The appendix included with the petition is referenced herein as "Pet. App. ——."

On January 3, 1996, Ms. Randolph filed an action in the United States District Court for the Middle District of Alabama, on behalf of herself and those similarly situated, against Green Tree Financial Corp.—Alabama, Green Tree Financial Corp., and Green Tree Financial Servicing Corp. (collectively "Green Tree") for: (1) violation of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*, for failing to reveal in its TILA disclosure the "vendors single interest" requirement; and (2) violation of the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. §§ 1691-1691f, for requiring Ms. Randolph to waive statutory causes of action.[2] Pet. App. 4a. The relief to which Ms. Randolph is entitled individually is estimated to be about $15.00, for the purchase of the vendors single interest. *See* Complaint, Exhibit A, *Randolph v. Green Tree Financial Corp.—Alabama*, Case No. 96-D-11-N, Pet. App. 20a (M.D. Ala. Jan. 3, 1996) (No. 1).

In response to the complaint, Green Tree filed a Motion to Stay Action and Compel Arbitration with supporting briefs and memoranda. Pet. App. 22a. At the request of the district court, on October 31, 1997, Green Tree filed a consolidated pleading—Motion of [Green Tree] to Compel Arbitration, Motion to Stay, or, in the Alternative, Motion to Dismiss and Brief in Support Thereof. *Id.* Instead of addressing the merits of Ms. Randolph's complaint, the district court focused on the enforceability of the arbitration provision in Ms. Randolph's contract. Pet. App. 22a n.3. On November 26, 1997, the district court entered an order: granting Green Tree's motion to compel arbitration; denying Green Tree's motion to stay; granting Green Tree's motion to dismiss the entire complaint *with prejudice*; dismissing Green Tree Financial Servicing Corporation as a party; and prohibiting Ms. Randolph from

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2 Ms. Randolph filed amended complaints on December 10, 1996 and September 29, 1997. Pet. App. 22a n.3.

adjudicating her claims in court. Pet. App. 50a. The district court also conceded that "compelling arbitration in this instance will eliminate Plaintiff's ability to arbitrate her claims on behalf of a class," Pet App. 46a, and that its order denied Plaintiff's class claims. Pet. App. 51a. While recognizing that Section 3 of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, permits a court to stay the proceeding in an action and compel arbitration, the district court chose instead to dismiss all Ms. Randolph's claims with prejudice, disposing of the case in its entirety, because all the underlying claims were subject to the arbitration agreement. Pet. App. 48a-49a (citing 9 U.S.C. § 3). Ms. Randolph filed a Motion for Reconsideration on December 10, 1997, which was denied on January 5, 1998. Pet. App. 51a, 54a.

In June of 1998, Ms. Randolph noted a timely appeal of the district court's order before the United States Court of Appeals for the Eleventh Circuit. Pet. App. 5a. Green Tree moved to dismiss the appeal for want of jurisdiction. *Id.* After briefing on the merits and argument, the Eleventh Circuit reversed, holding: (1) that "the district court's judgment was an appealable 'final decision' " which conferred jurisdiction upon the Court of Appeals; and (2) that Green Tree's arbitration agreement was unenforceable against Ms. Randolph. *Id.* at 2a.

Relying on the legislative history of the FAA and on *Catlin v. United States*, 324 U.S. 229, 233 (1945), *see* Pet. App. 10a-13a, the court of appeals concluded that because the order dismissing the case left no additional issues for the district court to resolve, *see* Pet. App. 8a, the order was a final decision subject to immediate review. Pet. App. 14a-15a.

The court of appeals also held Green Tree's arbitration clause was unenforceable in this case because the clause "failed to provide the minimum guarantees required to ensure that [Ms. Randolph could] vindicate her statutory

rights under the TILA." Pet. App. 15a. While recognizing the presumption in favor of arbitration, *see id.*, the court of appeals concluded that Green Tree's arbitration provision—which was silent about the allocation of arbitration costs and fees—and evidence presented at oral argument were insufficient to ensure that Ms. Randolph would not bear any significantly greater costs going through arbitration than if she went to court. *Id.* at 17a-19a.

Green Tree sought rehearing and suggested rehearing *en banc* of the Eleventh Circuit's decision, which was denied on October 28, 1999. *See* Pet. App. 55a-56a. On January 21, 2000, Green Tree filed a Petition for Writ of Certiorari, seeking review by this Court. Pet. 1.

REASONS FOR DENYING THE PETITION

I. THE CASE IS AN IMPROPER VEHICLE FOR RESOLVING A CONFLICT OVER THE SIGNIFICANCE OF THE "EMBEDDED"/"INDEPENDENT" DISTINCTION IN DETERMINING THE APPEALABILITY OF A COURT ORDER COMPELLING ARBITRATION BECAUSE OF ITS UNIQUE PROCEDURAL AND FACTUAL POSTURE.

A. The District Court's Order Dismisssing This Case With Prejudice Puts It in a Unique Procedural Posture.

Because the district court dismissed all of Ms. Randolph's underlying claims with prejudice, rather than staying them or dismissing them without prejudice, this case is not typical of those cases where the courts of appeals have considered the appealability of an order compelling arbitration within an embedded proceeding. Unlike the other circuits which have declined to allow appellate review, the Petitioners seek certiorari under unique circumstances where the district court has disposed of all issues before it with prejudice and compelled arbitration. This case is thus an inappropriate vehicle

through which to resolve a division among the circuit courts regarding this issue.

The threshold issue over which the circuit courts conflict is whether a district court's order to arbitrate is appealable as a "final decision" under the FAA.[3] 9 U.S.C. § 16(a)(3). Section 16(a)(3) allows appeals where there has been "a final decision with resect to an arbitration that is subject to this title." While Section 16 of the FAA does not define the term "final deci-

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[3] The FAA has specified the grounds on which appeals may be taken from arbitration rulings by district courts. Section 16 of the FAA states:

> (a) An appeal may be taken from—
>
> (1) an order—
>
> (A) refusing a stay of any action under section 3 of this title,
>
> (B) denying a petition under section 4 of this title to order arbitration to proceed,
>
> (C) denying an application under section 206 of this title to compel arbitration,
>
> (D) confirming or denying confirmation of an award or partial award, or
>
> (E) modifying, correcting, or vacating an award;
>
> (2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or
>
> (3) a final decision with respect to an arbitration that is subject to this title.
>
> (b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—
>
> (1) granting a stay of any action under section 3 of this title;
>
> (2) directing arbitration to proceed under section 4 of this title;
>
> (3) compelling arbitration under section 206 of this title; or
>
> (4) refusing to enjoin an arbitration that it subject to this title.

9 U.S.C. § 16.

sion," it has been well established for over half a century that appeals are available when the district court disposes of the issues before it in their entirety. *See Catlin*, 324 U.S. at 233 (defining "final decision" for purposes of appeal under section 128 of the Judicial Code). Indeed, this Court has held that a decision of the district court is final if it "ends litigation on the merits and leaves nothing for the court to do but execute the judgment." *Id.* at 233. Consistent with this well-established doctrine, the Eleventh Circuit interpreted the FAA's term "final decision" by looking to the "simplest traditional definition of finality: [whether] the decision has disposed of all the issues framed by the litigation, leaving nothing to be done but execute the order." Pet. App. 10a (citing 15B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3914.17 at 18-19 (2d ed. 1992)). *See also Arnold v. Arnold Corp.*, 920 F.2d 1269, 1275 (6th Cir. 1990) (holding that appellate jurisdiction exists over an order compelling arbitration in an embedded proceeding because district court had entered final judgment and had no other role than to "execute the judgment") (citing *Catlin*, 324 U.S. at 233); *Armijo v. Prudential Ins. Co.*, 72 F.3d 793, 797 (10th Cir. 1995) (holding that court of appeals had jurisdiction from district court's dismissal of plaintiffs' remaining claims with prejudice, because it was an appealable final decision).

It is over this issue of when a district court's order compelling arbitration under the FAA is final, that the circuit courts conflict. Several circuits have held that where a proceeding is "independent" (*i.e.*, where "the motion to compel arbitration . . . is the only claim before the district court") a final judgment ending such litigation is appealable immediately. *Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1302 (9th Cir. 1994); *see also Filanto S.p.A. v.*

Chilewich Int'l Corp., 984 F.2d 58, 60 (2d Cir. 1993). Other circuits have held that where a proceeding is "embedded" (*i.e.*, where the "arbitration issue arises as part of a broader action dealing with other issues"), that an order compelling arbitration must be treated as *de facto* interlocutory and nonappealable, not as a final decision under Section 16(a)(3). *See* Pet. App. 7a. *See also John Hancock Mut. Life Ins. Co. v. Olick*, 151 F.3d 132, 135-36 (3d Cir. 1998); *Seacoast Motors of Salisbury, Inc. v. Chrysler Corp.*, 143 F.3d 626, 628 (1st Cir.), *cert. denied*, 119 S. Ct. 410 (1998); *Napleton v. General Motors Corp.*, 138 F.3d 1209, 1212 (7th Cir.), *cert. denied*, 119 S. Ct. 341 (1998); *McCarthy v. Providential Corp.*, 122 F.3d 1242, 1244 (9th Cir., 1997), *cert. denied*, 119 S. Ct. 275 (1998); *In re Pisgah Contractors, Inc.*, 117 F.3d 133, 136 (4th Cir. 1997); *Altman Nursing, Inc. v. Clay Capital Corp.*, 84 F.3d 769, 771 (5th Cir. 1996); *Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93, 95 (8th Cir. 1994); *Filanto*, 984 F.2d at 60-61.

The circumstances that give rise to the division among the circuit courts, however, do not obtain here. Because the district court dismissed the plaintiff's claims in their entirety *with prejudice*, *see* Pet. App. 48a-49a, and did not stay the action or dismiss it without prejudice, the procedural posture of this case is far different from the majority of cases that have addressed the availability of review of an order compelling arbitration.[4] Unlike the other circuit

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[4] In general, there are two different courses of action a district court may take when ordering arbitration in an embedded arbitrability proceeding. In the majority of cases, the district court stays the case pending the outcome of arbitration in order to retain jurisdiction. *See Napleton*, 138 F.3d at 1212. In those situations, the order compelling arbitration is interlocutory, and therefore not final. *See Prudential*, 42 F.3d at 1302. In other instances, however, the district court dismisses the entire case with-

court decisions upon which the Petitioners rely, Pet. 14-19, the Eleventh Circuit's determination that the district court's order was a final decision, and thus immediately appealable, was based substantially on the action of the district court dismissing all the underlying claims with prejudice.[5] *See* Pet. App. 14a. This is a feature that is not present in the cases decided by circuits relying on the embedded/independent distinction. *See* Pet. App. 14a ("The opinions in those cases either involved dismissals without prejudice or did not clearly state the nature of the dismissal."). Indeed, in two circuits which denied review of orders compelling arbitration, the courts expressly reached that decision because, unlike the present case, the underlying case had been dismissed *without prejudice*. *See Napleton*, 138 F.3d at 1212 (stating that the issue before them was "whether, in the context of an embedded proceeding, *a dismissal without prejudice* 'to allow for arbitration' constitutes an appealable—*i.e.* final—decision.") (emphasis added); *Filanto*, 984 F.2d at 61 n.3 (theorizing that "[h]ad the complaint been dismissed, it is arguable that an appeal would be immediately available . . . .").

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out prejudice at the time it compelled arbitration. It is in this context—where claims are dismissed *without* prejudice in an embedded proceeding—that the majority of circuits have declined to find appellate jurisdiction. *See e.g., Napleton*, 138 F.3d at 1214 finding no jurisdiction where district court dismissed case without prejudice); *Seacoast*, 143 F.3d at 628-29 (same); *McCarthy*, 143 F.3d at 1245 (same); *Filanto*, 984 F.2d at 61 (finding no jurisdiction where district court did not dismiss complaint and stayed case pending arbitration).

[5] The Eleventh Circuit stated below that "'[a] dismissal with prejudice clearly is a decision that ends the litigation on the merits and leaves nothing for the court to do but execute judgment.'" Pet. App. 14a (citing *Morewitz v. West of England Ship Owners Mut. Protection & Indem. Ass'n (Luxembourg)*, 62 F.3d 1356, 1361 (11th Cir. 1995) (quoting *Nichols v. Mobile Bd. of Realtors, Inc.*, 675 F.2d 671, 673 (5th Cir. Unit B 1982))). This procedural distinction is critical and thus the case below does not present squarely the procedural situation over which the circuits conflict.

Accordingly, the unique procedural posture of this case makes it an inappropriate vehicle through which to resolve this circuit split.

B. This Case, Brought Below as a Class Action, Is Not a Proper Vehicle for Deciding Whether Appellate Courts Have Jurisdiction Over Appeals Within Embedded Proceedings.

Ms. Randolph filed the action below on behalf of herself and others similarly situated. Pet. App. 4a. The district court dismissed Ms. Randolph's individual claims and the claims brought on behalf of a class and compelled arbitration of Ms. Randolph's individual claims. Pet. App. 4a-5a. The review of the ruling allowing an immediate review of the order compelling arbitration would inevitably call into question the consequences for members of the putative class if such an immediate appeal were unavailable. These difficult issues would encumber this case, making it far from ideal for review.

Certiorari should be denied where there are procedural or factual irregularities in the underlying case that make it atypical of those in which the issue for review may normally arise. This case is factually atypical because it arose from a case styled as a class action. Pet. App. 4a. Because the compelled arbitration at issue does not allow for class claims, the dismissal of the class complaint denied putative class members the opportunity to proceed in a collective fashion. *See* Pet. App. 46a. The majority of cases in which the issue of appellate jurisdiction over district court orders compelling arbitration have arisen, have been proceedings brought by individuals seeking to vindicate their own individual interests. *See e.g.*, *Napleton*, 138 F.3d at 1210 (7th Cir.); *Olick*, 151 F.3d at 134-35 (3d Cir.); *Seacoast*, 143 F.3d at 627 (1st Cir.); *Pisgah*, 117 F.3d at 134 (4th Cir.); *Altman*, 84 F.3d at 770 (5th Cir.); *Armijo*, 72 F.3d at 795-96 (10th Cir.);

Filanto, 984 F.2d at 59-60 (2d Cir.); *Humphrey v. Prudential Ins. Co.*, 4 F.3d 313, 314 (4th Cir. 1993); *Arnold*, 920 F.2d at 1270 (6th Cir.). *But see McCarthy*, 122 F.3d at 1243 (9th Cir.) (class action context); *Gammaro*, 15 F.3d at 95 (8th Cir.) (same); *Perera v. Siegal Trading Co.*, 951 F.2d 780, 781 (7th Cir. 1992) (same).

Because this case implicates absent class members' rights and their ability to bring suits, review of this case will raise other issues than simply the conflict among the circuits over the meaning of "final decision" pursuant to the FAA. Should the Court grant certiorari in this case to determine whether an appellate court has jurisdiction pursuant to Section 16(a)(3) to review a district court order compelling arbitration in an embedded proceeding, even where the case has been dismissed with prejudice, the Court will also be faced with additional issues relating to the denial of a forum in which putative class members could pursue their claims collectively.

In addition, as discussed more fully, *infra* Section III, should the Court decide to review the exercise of appellate jurisdiction over the case below, enforcement of the arbitration clause could have the effect of denying to the vast majority of putative class members the opportunity to vindicate their rights under TILA. In fact, the district court below conceded that "[i]t is true that compelling arbitration in this instance will eliminate Plaintiff's ability to arbitrate her claims on behalf of a class." Pet. App. 46a. The operation of an arbitration clause that precludes a class action would impair the enforcement scheme of TILA. As such, this collateral consequence of enforcing such an arbitration clause would raise other issues not implicated in the vast majority of cases in which the review of an order compelling arbitration arises. This Court has been mindful to allow appeals of district courts'

rulings on certification issues so as not to "frustrate the objectives of class actions . . . ." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). Using this case as the vehicle for resolving the circuit split over the significance of the embedded/independent distinction in determining the appealability of an order compelling arbitration, could potentially frustrate the bringing of a TILA claim as a class action. Such factual irregularities caution against the propriety of granting certiorari in this instance.

II. THERE IS NO CIRCUIT SPLIT OVER THE ENFORCEABILITY OF AN ARBITRATION PROVISION WHICH IS SILENT ABOUT THE ALLOCATION OF ARBITRATION FEES AND COSTS.

Petitioners argue that this case concerns important federal law concerns about arbitrability upon which the circuit courts are divided. Pet. 23. However, there is no split among the circuit courts as to what constitutes the proper approach when determining the enforceability of an arbitration agreement. The United States courts of appeals, including the Eleventh Circuit, have uniformly embraced the strong federal policy favoring arbitration and the presumption which exists in its favor when making arbitrability determinations.[6] The Eleventh Circuit's holding that Green Tree's arbitration agreement is un-

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[6] *See e.g., KKW Enters. v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 49 (1st Cir. 1999); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1057 (11th Cir. 1998); *Porter Hayden Co. v. Century Indem. Co.*, 136 F.3d 380, 384 (4th Cir. 1998); *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1209 (9th Cir. 1998); *Napleton*, 138 F.3d at 1214 (7th Cir.); *Fleet Tire Serv. of North Little Rock, Inc. v. Oliver Rubber Co.*, 118 F.3d 619, 621 (8th Cir. 1997); *National Union Fire Ins. Co. v. Belco Petroleum Corp.*, 88 F.3d 129, 133 (2d Cir. 1996); *Armijo*, 72 F.3d at 797 (10th Cir.); *Walker v. J.C. Bradford & Co.*, 938 F.2d 575, 578 (5th Cir. 1991); *Wiepking v. Prudential-Bache Sec., Inc.*, 940 F.2d 996, 998 (6th Cir. 1991); *Pearce v. E.F. Hutton Group, Inc.*, 828 F.2d 826, 829 (D.C. Cir. 1987).

enforceable because it is silent about the allocation of arbitration fees and costs—thereby creating a risk that Ms. Randolph will bear the heavy costs of arbitration and discourage her from pursuing her TILA claims altogether —in no way veers from this fundamental approach.

A. Arbitration Agreements, Like Other Contracts, May Be Unenforceable Where They Undermine a Plaintiff's Ability to Protect Important Federal Statutory Rights.

Arbitration agreements are contracts and must be interpreted in the same manner as contracts. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (FAA "place[d] arbitration agreements on the *same* footing as other contracts.") (emphasis added). While arbitration may be a favored forum, arbitration agreements are not to be given *more* preference than other contracts. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (purpose of FAA was to make "arbitration agreements as enforceable as other contracts, but not more so"). Furthermore, not all statutory claims are appropriate for arbitration, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985), and "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute." *Gilmer*, 500 U.S. at 26. Where a plaintiff demonstrates that there is an "inherent conflict" between arbitration and the statute's underlying purposes, an arbitration agreement may be unenforceable. *Gilmer*, 500 U.S. at 26; *see also Paladino*, 134 F.3d 1062 ("When an arbitration clause has provisions that defeat the remedial purpose of [a] statute, . . . the arbitration clause is not enforceable.").[7]

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[7] Similarly, in *Shankle v. B-G Maintenance Management of Colorado, Inc.*, the Tenth Circuit stated:

> As *Gilmer* emphasized, arbitration of statutory claims works because potential litigants have an adequate forum in which

B. The Decision to Deny Enforcement of the Arbitration Clause Follows Well-Accepted Federal Principles Upon Which There Is No Disagreement.

The Eleventh Circuit's determination that Green Tree's arbitration provision was unenforceable follows well-established federal principles, over which there is no circuit conflict appropriate for this Court's review. Contrary to Petitioners' characterizations, *see* Pet. 10, the Eleventh Circuit is not hostile to the FAA or to arbitration. But, a presumption in favor of arbitration does not preclude review of the propriety of arbitration in particular circumstances. While acknowledging the general presumption in favor of arbitration, the Eleventh Circuit decided that arbitration was not appropriate in this case because the costs and fees associated with arbitration could impose an overwhelming burden on Ms. Randolph. Pet. App. 15a-19a. Where an agreement compels arbitration on terms materially more burdensome than those that would be present if a party sought relief in court, the agreement effectively prohibits that party from enforcing her statutory rights. *See* Pet. App. 15a-16a; *see also Paladino*, 134 F.3d at 1062; *Shankle*, 163 F.3d at 1234 n.3. Here, the Eleventh Circuit found that arbitration would potentially impose costs and fees upon Ms. Randolph that would not normally be borne by her in a judicial forum, creating the substantial risk that Ms. Randolph would be financially deterred from enforcing her rights under TILA altogether. Pet. App. 16a-19a.

> to resolve their statutory claims and because the broader social purposes behind the statute are adhered to. This supposition[] falls apart, however, if the terms of an arbitration agreement actually prevent an individual from effectively vindicating his or her statutory rights. Accordingly, an arbitration agreement that prohibits use of the judicial forum as a means of resolving statutory claims must also provide for an effective and accessible alternative forum.
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> 163 F.3d 1230, 1234 (10th Cir. 1999).

While the arbitration agreement did not expressly impose the substantial costs of arbitration on Ms. Randolph, its silence on the allocation of such costs created at the very least a risk that she would bear such costs. *See* Pet. App. 17a-19a. Since Green Tree drafted the arbitration clause, ambiguity in the agreement was, and should have been, assessed against its interests. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62-63 (1995) ("Respondents drafted an ambiguous [arbitration] document, and they cannot now claim the benefit of the doubt."); *United States v. Seckinger*, 397 U.S. 203, 210 (1970). The Eleventh Circuit has done no more than hold Green Tree's arbitration agreement unenforceable because it failed to delineate how fees and costs would be allocated among the parties, creating an unacceptable risk to Ms. Randolph that her efforts to enforce her statutory rights would impose unaffordable costs on her. In conformance with well-accepted federal principles, the Eleventh Circuit properly barred enforcement of such an agreement.

C. Other Circuit Decisions Are Consistent With the Approach Taken by the Eleventh Circuit.

No conflict in the circuits exists over what constitutes the appropriate approach in determining the enforceability of an arbitration clause that fails to ensure the same fees and costs allocation as would be available in a judicial forum. If anything, other circuits which address arbitration clauses that have been silent on the applicability of statutorily created rights are in accord with the approach taken by the Eleventh Circuit.[8] When interpreting the enforceability of an arbitration agreement which was silent about the scope of the

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[8] *But see, Cole v. Burns Int'l Sec. Servs., Inc.*, 105 F.3d 1465 (D.C. Cir. 1997).

claims covered, for example, the First Circuit concluded that the agreement's drafter, rather than the party challenging the agreement, should bear the risk of silence and ambiguity. *See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 19 & n.16 (1st Cir. 1999). Notwithstanding the presumption in favor of arbitrability,[9] the First Circuit concluded that the agreement was unenforceable because the drafter failed to make clear that employment claims were included within the scope of covered claims. *Rosenberg*, 170 F.3d 1, 17-19. Rather than present a conflict, as Petitioners argue, *Rosenberg* demonstrates the uniformity of the circuit courts in their approach to determining arbitrability where an arbitration clause is ambiguous.

Most authorities on which the Petitioners rely to suggest a split in the circuits either fail to address how silence in arbitration agreements should be treated or are easily distinguishable. *See* Pet. 25-29. For example, in *Koveleskie v. SBC Capital Markets, Inc.* 167 F.3d 361 (7th Cir. 1999), the Seventh Circuit had no occasion to interpret an arbitration provision that was silent about fees and costs. There, the court simply held that the prospect of a plaintiff bearing a share of fees in arbitration in the securities industry—where most plaintiffs did not bear such costs—did not preclude the arbitration of a claim arising under Title VII of the Civil Rights Act of 1964. *Koveleskie*, 167 F.3d at 364-66.

Similarly, *Dobbins v. Hawk's Enterprises*, 198 F.3d 715 (8th Cir. 1999), upon which the Petitioners also rely, has no bearing on the enforceability of an arbitration agreement which is silent about such costs. While the Eighth

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[9] In *Rosenberg*, the First Circuit recognized, not only the presumption in favor of arbitrability under the FAA, but also under the Civil Rights Act of 1991, and still found the arbitration agreement unenforceable. *Rosenberg*, 170 F.3d at 10, 18-19.

Circuit addressed the allocation of arbitration costs in *Dobbins*, the court, however, simply recognized that the potential of high arbitration costs on a plaintiff could make an arbitration agreement unconscionable, and it recognized that unconscionability determinations must be made on a "case-by-case basis" in accordance with state law. *Dobbins*, 198 F.3d at 717 (noting "courts across the country" share same concern). Because the *Dobbins* plaintiffs failed to exhaust the procedures available to them to waive or reduce the arbitration fees, the Eighth Circuit concluded that it could not make an unconscionability determination, and remanded the case. *Id.*

In sum, the Petitioners have failed to demonstrate a circuit split over the approach taken to determine the enforceability of an arbitration agreement which fails to specify how arbitration fees and costs will be allocated among the parties.[10]

III. THE ELEVENTH CIRCUIT'S DECISION WAS CORRECT ON THE MERITS.

Although the merits are not directly at issue here, the Eleventh Circuit's decision is soundly based and therefore does not warrant review.

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10 Contrary to the Petitioners' assertion, Pet. 24-25, there is no federal circuit split over the enforceability of Green Tree's arbitration provision and to the extent any difference exists between the Eleventh Circuit and the Alabama State Supreme Court, it does not involve the protection of federal statutory rights. In *Harris v. Green Tree Financial Corp.*, 183 F.3d 173, 182-84 (3d Cir. 1999), the Third Circuit merely held that the arbitration agreement was enforceable because there was no lack of mutuality or unconscionability, neither of which issues are before this Court. The state court decisions upholding Green Tree's arbitration provision are based exclusively on the interpretation of state contract law or do not present a situation in which the federal policy in favor of arbitration must be counterbalanced with a court's obligation to protect a plaintiff's federal statutory rights. *See Green Tree Fin. Corp. v. Wampler*, No. 1970983 1999 WL 667292 at *6 (Ala. Aug. 27, 1999).

A. The Eleventh Circuit Properly Found That the District Court's Decision to Dismiss the Case With Prejudice Was a Final Decision, Warranting Immediate Review.

The Eleventh Circuit correctly relied on this Court's interpretation of the term "final decision" in *Catlin* in construing the availability of appellate review pursuant to Section 16(a)(3) over orders dismissing a case with prejudice and compelling arbitration. *See* Pet. App. 10a (citing *Catlin*, 324 U.S. at 233). The court of appeals noted that while a number of circuits have "adhered, with a concededly 'myopic[]' focus, to the embedded/independent distinction in determining whether they had jurisdiction to hear an appeal under § 16(a)(3)," Pet. App. 8a (citing *Napleton*, 138 F.3d at 1213), nothing in the plain language of the FAA requires the courts to make such a distinction decisive. *See* Pet. App. 11a. Instead, the court was informed by the definition of "final decision" which was of long-standing when Congress enacted Section 16(a)(3), rather than be guided by the same degree of "talismanic significance," *Napleton*, 138 F.3d at 1211, that other circuits placed on the difference between independent and embedded proceedings. *See* Pet. App. 10a.

Where the district court's dismissal with prejudice leaves nothing for the court to resolve, as occurred below, the distinction between embedded and independent proceedings makes little sense. There is no risk of piecemeal appeals where the district court has decided all the issues before it with prejudice. *See Catlin*, 324 U.S. at 233 (stating that the definition of finality is one where there is "nothing for the [district] court to do but execute the judgment"). Accordingly, the order compelling arbitration was a final decision susceptible of immediate appellate review.

B. Given the Failure to Protect the Plaintiff From the Costs of Arbitration and the Unavailability of the Class Action Mechanism Under Green Tree's Arbitration Agreement, the Court of Appeals Was Correct to Hold the Agreement Unenforceable.

The Eleventh Circuit was correct in precluding the enforcement of an arbitration clause that did not make clear the allocation of costs associated with arbitration. Accordingly, review of that decision is unwarranted. It was clear that Congress intended persons aggrieved by practices prohibited by TILA, who have meritorious claims, would have their costs paid by the defendant. *See* 15 U.S.C. § 1640(a)(3).[11] As the Eleventh Circuit recognized in considering the enforcement scheme established by Congress:

> The award of attorney's fees, as a practical matter, is a critical and integral part of this plan. In order to effectuate this scheme, attorneys who bring TILA cases should be secure in their expectation of fees from a successful action and should be able to pursue their right to fees in federal court. . . . [Where] creditors who have violated the Act [could] escape liability for attorney's fees . . . such a practice would thwart both the statute's private enforcement scheme and its remedial objectives.

James v. Home Const. Co., 689 F.2d 1357, 1359 (11th Cir. 1982) (regarding settlement). A failure to guarantee that a successful plaintiff be spared the costs of arbi-

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[11] In particular, TILA states:

> [A]ny creditor who fails to comply with any requirement imposed under this part . . . with respect to any person is liable to such person in an amount equal to the sum of—
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> . . . .
>
> (3) in the case of any successful action to enforce the foregoing liability . . . , the costs of the action, together with a reasonable attorney's fee as determined by the court . . . .

15 U.S.C. § 1640(a)(3).

tration would put in jeopardy a substantive right that was guaranteed by Congress. As such, the Eleventh Circuit wisely declined to enforce an arbitration clause that could have undermined TILA's enforcement scheme.

Furthermore, had the district court's order compelling arbitration been upheld, Ms. Randolph would have been deprived of the opportunity to pursue the class claims advanced below because Green Tree's arbitration clause failed to provide for any means of proceeding collectively. Such denial of an opportunity to pursue a class action would have deprived Ms. Randolph and other similarly situated individuals access to class treatment under Rule 23 of the Federal Rules of Civil Procedure and undermined an enforcement mechanism under TILA that Congress expressly endorsed. While the Eleventh Circuit never reached the issue of whether Green Tree's arbitration clause was unenforceable because it precluded a class action, the decision to deny enforcement may nevertheless be sustained on this alternative ground.[12]

In enacting TILA, Congress clearly contemplated that the statute could be enforced on behalf of a class. The statutory language makes clear reference to an individual's ability to bring a class action. *See* 15 U.S.C. § 1640 (a)(2)(B).[13] The legislative history reveals the strong

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[12] This issue was fully briefed before the Eleventh Circuit. *See* Brief of Appellant, Pet. App. 1a (Docket entry dated July 15, 1998); Appellant's Motion to Allow Filing of Supplemental Authority and Notice of Filing Supplemental Authority, Pet. App. 1a (Docket entry dated Sept. 15, 1999); Reply Brief of Appellant, Pet. App. 1a (Docket entry dated Aug. 17, 1998). Therefore, it is appropriate to raise this alternative ground. *See Langnes v. Green*, 282 U.S. 531, 538 (1931).

[13] The Act provides in pertinent part:

> [A]ny creditor who fails to comply with any requirement imposed under this part . . . with respect to any person is

Congressional endorsement of a class action as an important vehicle for enforcing the statute. In particular:

> The Committee believes that the present ambiguities and uncertainties with respect to class action suits under Truth in Lending should be clarified. Moreover, the Committee agrees with the Federal Reserve Board that 'potential class action liability is an important encouragement to the voluntary compliance which is so necessary to insure nationwide adherence to uniform disclosures' and that such remedies should not be restricted to actual damages.

Bantolina v. Aloha Motors, 419 F. Supp. 1116, 1120 (D. Haw. 1976) (citing S. Rep. No. 93-278, at 14-15 (1973)). In enacting the 1974 amendments to TILA, Congress recognized:

> [t]he possibility of class-action exposure is essential to the prophylactic intent of the Act, and is necessary to elevate truth-in-lending lawsuits from the ineffective nuisance category to the type of suit which has enough sting to insure that management will strive with diligence to achieve compliance.

Bantolina, 419 F. Supp. at 1120 & n.12 (citing Federal Reserve Board, 1972 Annual Report on Truth in Lending (1972), *cited in* 119 Cong. Rec. 25415 (1973) (state-

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liable to such person in an amount equal to the sum of—

. . . .

(B) *in the case of a class action*, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in *any class action or series of class actions* arising out of the same failure to comply by the same creditor shall not be more than the lesser of $500,000 of 1 per centum of the net worth of the creditor . . . .

15 U.S.C. §1640(a)(2)(B) (emphasis added).

ment of Mr. Moss)). Plainly, the class action mechanism is integral to the enforcement of TILA.

Precluding Ms. Randolph from bringing a class action would have a profound effect on similarly situated individuals whose claims were covered by the complaint. Absent class treatment, each person aggrieved by Green Tree's arbitration clause would be required to arbitrate his or her own claim. The imposition of potentially prohibitive costs, as well as the limited financial recoveries likely to be obtained by each individual, make it extremely unlikely that many, if any, individuals would vindicate their rights through arbitration. Having been denied access to the courts, these individual claimants would be effectively denied an opportunity to vindicate their rights under TILA at all. *See McCarthy*, 122 F.3d at 1249 (Pregerson, J., dissenting) (enforceability of arbitration agreement would have done "more than close the door on federal court proceedings; it [would have] effectively sound[ed] a death knell for the entire action."). As this Court has well recognized, the class action device is designed to permit the collective prosecution of the very kind of claims that were brought below:

> [W]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.

Roper, 445 U.S. at 339; *see also Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997). Thus, the Eleventh Circuit correctly held unenforceable an arbitration provision which precluded persons aggrieved under TILA from pursuing their rights as a class.

CONCLUSION

For the reasons described above, the petition for writ of certiorari should be denied.

Respectfully submitted,

C. KNOX MCLANEY, III
MCLANEY & ASSOCIATES, P.C.
509 S. Court Street
P.O. Box 4276
Montgomery, Alabama 36103
(334) 265-1282

LYNN W. JINKS, III
JINKS, DANIEL & CROW, L.L.C.
219 N. Prairie Street
P.O. Box 350
Union Springs, Alabama 36089
(334) 738-4225

JOSEPH M. SELLERS *
SUZETTE M. MALVEAUX
DEBORAH J. VAGINS
COHEN, MILSTEIN, HAUSFELD & TOLL, P.L.L.C.
1100 New York Avenue, N.W.
West Tower, Suite 500
Washington, D.C. 20005
(202) 408-4600

Counsel for Respondent

* Counsel of Record

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